IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:16/8/2004

CORAM
THE HONOURABLE MR.JUSTICE V.KANAGARAJ

S.A.No.2059 of 1989

1. P.Sundari Nadachi (died)
2. Selvamony
3. Nesamony
4. Baby
5. Ponnesam

(Appellants 2 to 5 brought on record as legal representatives of the deceased sole appellant vide order dated 11.9.2002 in C.M.P. No.20043 of 2001) .. Appellants

-Vs-

1. Appiamma Nadachi
2. A.Erayumman Nadar
3. A.Palayyan Nadar
4. A.Nakshatram Nadathi
5. M.Yohannan Nadar
6. A.Silus
7. Johnrose .. Respondents

For appellants : Mr.Chandrasudan
^For R2 & R.3 : Mr.T.R.Rajaraman

Second Appeal preferred under Section 100 of C.P.C. against the judgment and decree dated 23.1.1989 rendered in A.S.No.24 of 1988 by the learned District Judge, Kanyakumari at Nagercoil thereby confirming the judgment and decree dated 18.10.1979 rendered in O.S.No.370 of 196 8 by the Court of learned Additional District Munsif, Kuzhithurai.

:JUDGMENT

The unsuccessful plaintiff before both the Courts below (now represented by legal representatives), are the appellants herein.

2. The case of the plaintiff is that she filed a suit for redemption. One Velayudhan, son of Kumaran, mortgaged the suit property in favour of one Nallamuthan, son of Poruthiyudayan on 19.11.1076 M.E. The plaintiff purchased the Eastern 88 cents on the Northern end of the suit property from the successor in interest of the mortgagor. Defendants-2 to 4 are the heirs of the mortgagee, and under them, the plaintiff is in possession of the entire

mortgaged property. Defendants-1, 2 and 4 executed three sub-mortgages for Rs.504.94. The plaintiff obtained these sub mortgage rights on payment and is in possession of the property. The mortgage amount payable for redemption is 200 panams. The value of improvements including the value of building is Rs.400/-. The plaintiff has already paid Rs.504.94 on account of the sub-mortgages executed by the mortgagees. After setting off the value of improvements and the proportionate mortgage amount, the plaintiff is entitled to Rs.76.80. Defendants-1, 5 and 6 were impleaded as they were reported to have some interest in the mortgage right. The other half of the suit mortgage right was decreed to be redeemed in O. S.No.336 of 1963 on the file of the Court of District Munsif, Kuzhithurai, and the plaintiff was entitled to redeem half of the suit mortgage and recover possession of the northern half excluding the portion in the possession of the plaintiff from the defendants free of any mortgage money.

3. The case of the first defendant is that he is not a mortgagee as alleged and that he is the jenmi of the suit property. No mortgagee subsists with respect to the suit property. The mortgage under 1076 mortgage did not get possession of the prop . The sale deed in favour of the plaintiff is a void document executed by incompetent persons. The executant of the sale deed in favour of plaintiff is not the successor in interest of the mortgagor. The plaintiff has no possession over any portion. The first defendant has perfected title to the property by adverse possession. The plaintiff is not entitled to redeem any portion of the property.

4. The case of defendants-3 and 4 is that the suit mortgage is not subsisting and it is barred by limitation; that he original mortgagee Nallamuthan was their grandfather; that the third defendant has got a building in the property and is residing there; and that the case in O.S.No.336 of 1963 is pending in appeal before the High Court.

5. The case of defendants-5 and 6 is that the plaintiff and her husband executed a mortgage in favour of the fifth defendant on 23.4.196 2 and the fifth defendant is in possession and enjoyment as a mortgagee and that he has effected improvements in the property. The redemption of mortgage in favour of the fifth defendant has not been prayed for. The mother of sixth defendant had put up a house in the property and is residing there for the last 40 years; but she has not been impleaded as a party to the suit and that the suit is bad for nonjoinder of parties.

6. Defendants-3 and 4 would file an additional written statement contending that the sale deed in favour of the plaintiff is ab-initio void in view of Section 25 of the Nayar Act. On the date of the sale, Gowri Pillai was not the Karnavathy of the sub-tarwad and on the said date, all the children were majors. The sale deed has been executed without the consent of the adult members and it is not supported by consideration. The mortgage property is not included in the property obtained by the plaintiff□s vendor and as such the plaintiff is not entitled to redeem the same.

7. The plaintiff filed a reply statement, stating that the mortgage

is not barred and it is subsisting. The first defendant is incompetent to deny the title of the vendors of the plaintiff. The plaintiff is in possession of the portion of the property included in the documents dated 5.2.1968 and 6.10.1968. The mother of the sixth defendant is living only with the sixth defendant.

8. The trial Court, on consideration of the oral and documentary evidences, framed eleven issues and three additional issues and dismissed the suit namely, O.S.No.370 of 1968 with costs by its judgment dated 18.10.1979, aggrieved by which, the plaintiff preferred an appeal in A.S.No.24 of 1988 before the learned District Judge, Kanyakumari at Nagercoil, and also filed I.A.No.282 of 1988 under Order 41 Rule 27, C.P.C. for reception of four documents as additional evidence which relate to the earlier proceedings in O.S.No.336 of 1963 on the file of the District Munsif, Kuzhithurai, and also filed I.A.No.2 of 1989 for reception of an additional document executed by one Asari Nadar and another in favour of Chellakkannu Nadar and another dated 22.4.1942 .

9. The lower appellate Court, on consideration of the oral and documentary evidence, framed the following issues for consideration in A. S.No.24 of 1988 as well as in I.A.No.282 of 1988 and I.A.No.2 of 1989:

(1) Whether the plaintiff is entitled for redemption of the mortgage?

(2) Whether the suit mortgage is barred by time?

(3) Whether the first defendant has perfected title by adverse possession?

(4) Whether the sale deed in favour of the plaintiff is valid and binding on the defendants?

(5) Whether the property purchased by the plaintiff includes the plaint mortgage property?

(6) Whether I.A.No.282 of 1988 and I.A.No.2 of 1989 can be allowed?

10. The lower appellate Court, referring to Section 2(7) of the Travancore Nayar Act, Sections 25 and 39 of the Nair Act and relying on the

decisions reported in 1967 K.L.T. 430, 1954 K.L.T. 383 and 1984 K.L.J. 1055, confirmed the judgment of the trial Court and dismissed the appeal by judgment and decree dated 23.1.1989 in A.S.No.24 of 1988.

11. Aggrieved by the said judgment, this appeal has been preferred on grounds such as (i) that the learned Subordinate Judge has not properly understood the pleadings of the parties and the points arising for determination in the proper perspective; (ii) that the Court below failed to appreciate the significance of the circumstances leading to the transaction as evidenced by Ex.A3 □ sale deed; that the partition effected in 1931 under Ex.A-2, Gouri Pillai, Party No.9, who was then 20 years of age and had a minor son, was allotted 4 acres 56 cents as Item No.4 in Schedule 9 and this was plot No.15 in S.No.994-A and it was out of this share that Gouri conveyed 88 cents under Ex.A3 to the plaintiff; (iii) that it is clear from the records that at one stage i.e., before her son became a major, Gouri was the Karnavathi and she was managing the sub-tarwad properties and that even though her son attained majority, she continued to be in management, and in the course of such management, she executed Ex.A-3, in favour of the plaintiff; (iv) that Section 25 of the Nair Regulation Act is intended to protect the rights of the members of the tarwad and it can be invoked only by the members

of the tarwad and not by strangers, and that this proposition finds support in the cases reported in 29 T.L.J. Page 880 and AIR 1957 TRAVANCORE-COCHIN 189 and these decisions were not considered by the learned Subordinate Judge though they were cited and urged upon before the Courts below for consideration as to their relevancy and applicability to the facts of the instant case; (v) that the Courts below failed to see that Ex.A2 □ partition deed properties were jointly allotted to Party No.9 Gouri Pillai and minor son Velayudhan Pillai; and Gouri Pillai being the only adult member, was in law the Karnavan of that group and she had functioned as such and that the defendants have not adduced any e vidence to show that she was divested of her karnavanship at any time. Her sons, though became majors, did not take over the management from her. They were employed and they acquiesced in the management of the tarwad by their mother and so, after Gouri Pillai□s eldest son attained majority Gouri Pillai was, in the eye of law, a junior member in management and that the alienation of a defacto karnavan or a junior member in management is valid until it is set aside and it is upto the members of the tarwad whose interests are affected by the alienation, to challenge it. If they do not challenge it and allow it to stand unchallenged for a period of 12 years, the alienation will become indefeasible and thereafter even the members of the tarwad are not competent to question it on account of the bar of limitation; (vi) that the Court below ought to have seen that Ex.A3 is dated 14.2.1968 and by that time, the same deed has become indefeasible and even the children of Gouri Pillai were not competent to set it aside or impeach its validity thereafter and hence, the conclusion of the lower Courts that Ex.A3 is not valid and does not confer title on the plaintiff is wrong and untenable; (vii) that the Court below failed to appreciate the significance of Ex.A10, the partition deed since subsequent to Ex.A3, Gouri Pillai and her children entered into a partition deed in respect of the tarwad properties and a copy of that partition deed is Ex.A10 and Ex.A3 property is not included in Ex.A10, which is a positive proof of the fact that the children of Gouri Pillai acquiesced the property in Ex.A3; (viii) that the Courts below ought to have held the members of the tarwad of Gouri Pillai i.e., the children of Gouri Pillai were not competent to question the validity of Ex.A3 after A10 date and that in any event, the defendants, being strangers to the tarwad are not competent to question the validity of Ex.A3 and hence the plaintiff obtained valid title to the suit property and consequently, has got the right to redeem one half of Ex.A1 property, as prayed for in the plaint; (ix) that the Court below ought to have seen that Section 25 of the Nair Act is intended to safeguard the members of the tarwad and they alone can rely on it and not strangers to the tarwad and that the Court below ought to have considered Exs.C1 and C2 report and plan which prove the location of the mortgaged property and other relevant facts and that the lower appellate Court erred in law in rejecting the additional evidence sought to be adduced in the appeal despite the fact that the appellant has sufficient and valid reason for not producing the same in the trial Court; (x) that the Court below ought to have considered the facts that emerge from the application for additional evidence that in O.S.336 of 1963, a Commissioner was appointed and he filed his report and plan which were marked as Exs.C1 and C2 in the suit and the Court accepted the report and plan and gave decree on that basis; the plaintiff and defendants 1 to 4, being parties to O.S.No.336 of 1963 are bound by Ex.C1 and C2 of that suit and these documents need not be proved over again in the

present suit; the observation made by the lower appellate Court is that the Commission report and plan filed in O.S.No.336 of 1963 cannot be admitted straight away and accepted in this case and that the report of the Commissioner, however, is not per se evidence in any other suit unless its accuracy is proved in the ordinary way. This observation has been made by the lower appellate Court did not see that the appellant as well as all the contesting respondents are parties in O.S.No.336 of 1963 and that the evidence in O.S.No.336 of 1963 binds them; (xi) that under Ex.A2 partition deed, Ex.A1 property fell within plots 15 and 16, Plot 15 was allotted to Gouri Pillai and Plot 16 was allotted to one Parvathi Pillai and the rights of Parvathi Pillai were obtained by one Bhagavathi Amma. To redeem the mortgage over Plot 16, Bhagavathi Amma filed O. S.No.336 of 1963 before the Court of District Munsif, Kuzhithurai; the first defendant is the 11th defendant in that suit and defendants 2 to 4 are defendants 2 to 4 and the plaintiff is defendant No.14 and the plaintiff□s vendor Gouri Pillai is defendant No.17 and she has been impleaded as defendant No.17 as the owner of the equity of redemption for mortgage over plot No.15 of S.No.994-A. In O.S.No.336 of 1963 , Ex.A1 property is scheduled as A schedule property and that portion of A schedule in Ex.A1, fell within Plot 16 is described as B Schedule in that plaint. It is stated in the plaint that the equity of redemption over the remaining portion of A Schedule property vests with the 17th defendant under the 1106 partition deed. This averment in that plaint went unchallenged throughout the proceedings and a decree was passed on that basis. Defendants 2 to 4 and 11 of that suit did not make any contentions refuting that averment and it remained as an admitted fact,if not expressly, at least by necessary implication; (xii) that the Court below ought to have admitted the copy of the judgment in O.S.No.336 of 1963 as additional evidence by allowing I.A.No.282 of 1988 and that the application was rejected on flimsy grounds; and the judgment in O.S.No.336 of 1963 shows that Gouri Pillai was treated as the owner of Plot No.15 and owner of the equity of redemption of one half of Ex.A1 mortgage and that the contesting defendants being parties in that suit, are bound by that decree and are not now competent to deny the right of Gouri Pillai, the 17th defendant, who is the vendor of the plaintiff and that the lower appellate Court ought to have allowed I.A.No.282 of 1988 and marked the judgment copy of Ex.A11 and relied on it to record a finding that the plaintiff□s vendor had title to plot 15 and that one half of Ex.A1 property occupies the eastern portion of Plot No.15; (xiii) that the learned District Judge erred in holding that the affidavits filed in support of I.A.No.2 82 of 1988 and I.A.No.2 of 1989 do not disclose any valid reason for not filing the documents earlier and has not perused the affidavits fully and properly and hence the rejection of the applications is improper and illegal; (xiv) that having held that the first defendant has not perfected title to the property by adverse possession that that the suit is not barred by limitation, the lower appellate Court ought to have decreed the suit holding that the plaintiff has established her title to the suit property.

12. This Court has admitted the above second appeal for determination of the following substantial questions of law:
(1) Whether the Courts below are right in holding that the sale deed Ex.A3 is hit by Section 25 of the Nair Act notwithstanding several judicial pronouncements of the High Court of Travancore-Cochin interpreting Section 25

of the Act to the effect that the said Section is enacted for the benefit of the members of the Tarwad and cannot be invoked by a stranger?
(2) Whether the rejection of I.A.No.282 of 1988 and I.A.No.2 of 1989 are illegal and improper having regard to the circumstances set out in the affidavit filed in support of the applications which satisfy the requirements of Order 41 Rule 27, C.P.C.?

13. During arguments, the learned counsel appearing on behalf of the appellants would submit that originally the suit was decreed; that on appeal by the defendant it was remanded to the trial Court on two grounds, (i) that the Commissioner did not identify the property and (ii) for framing of additional issues; after remand, that this appellant lost before both the Courts and hence the above second appeal; that the mortgage was executed by Velayudhan in favour of Nallamuthan; that the appellant purchased from the successors of the mortgagor, namely, Gouri Pillai; that half of the Southern portion of the property had already been redeemed; that it is the other half which the plaintiff wants to redeem; that the first defendant had some interest in the property; that the third and fourth defendants contended that they were minor members and a junior member cannot dispose of the property and on that basis alone, the suit was dismissed.

14. The learned counsel for the appellants, citing from the typed set of papers, particularly, from the judgments of the lower Court would ultimately cite judgments in favour of the case of the appellants reported in A.I.R. 1957 Travancore page 189 (SIVARAMA KONAR v. THIRUVADINATHA PILLAI) wherein the Karnavan of a tarwad executed a sale of the tarwad property which was under mortgage and again he sold it to another. The purchaser under the first sale filed a suit for redemption. In that suit the purchaser under the later sale deed and the mortgagee raised the contention that the sale to the plaintiff was void on the ground that the consent of the other members of the tarwad was not proved. In those circumstances it has been held:

(i) that it was not open to the second purchaser to resist the claim of plaintiff on that ground.
(ii) the position of the mortgagee was also the same. Although it was open to him to ask the plaintiff to prove how he traced his right to the mortgagor it was not open to him to challenge the validity of the assignment which purported to transfer the mortgagor's right to the plaintiff on the ground on which he sought to do so. 30 TLJ 415 Explained".

"A Karnavan by himself cannot alienate properties of a Marumakkathayam tarwad without the consent express or implied of the other adult member."

"But the principle that the validity of deeds executed by karnavans without the consent of other adult members can be challenged, has been laid down only for the benefit of the members of the tarwad and not for the benefit of the strangers to the family."

On such arguments, the learned counsel for the appellants would seek to allow the above second appeal setting aside both the judgments and decrees passed by the trial Court and the first appellate Court as well.

15. On the contrary, the learned counsel appearing on behalf of the respondents 2 and 3 would sail along with the judgments of the Courts below since both of them are in his favour and would say that there is absolutely no case for the appellants to offer particularly on second appeal, especially, adhering to the substantial questions of law framed testifying the validity of Section 25 of the Travancore Nayar Act and further testifying the rejection order passed by the first appellate Court in I.A.Nos.282 of 1988 and 2 of 1989; that tangible reasons have been assigned by the trial Court and the appellate Court respectively for both the substantial questions of law in their judgments and, therefore, there is absolutely no need to go into such questions, by which the appellants cannot at all improve their case and on such arguments, the learned counsel appearing on behalf of the respondents 2 and 3 would seek to dismiss the above second appeal.

16. In consideration of the facts pleaded, having regard to the material placed on record and upon hearing the learned counsel for both what comes to be known is that it is the suit for redemption of the mortgage dated 19.11.1076 M.E. filed on averments such as that the plaintiff having purchased the Eastern 88 cents on the Northern end of the suit property from the successor-in-interest of the mortgagor; that defendants 2 and 4 are the heirs of the mortgagee and under them the plaintiff is in possession of the entire mortgaged property; that defendants 1,2 and 4 have executed three sub-mortgages in favour of the plaintiff on receipt of payment and the plaintiff was in possession of the property; that defendants 1,5 and 6 were impleaded as they were reported to have had some interest in the mortgage right. This suit would be resisted by the first defendant on grounds that the first defendant was not the mortgagee; that it was a germane of the suit property; that there was no mortgage in existence; that under the mortgage of the year 1076 M.E., possession was not given; that the sale deed executed in favour of the plaintiff is a void document executed by a person who is not the successor-in-interest of the mortgagor; that the plaintiff has no possession over any portion of the property; that the first defendant has perfected title by means of adverse possession and that the plaintiff is not at all entitled to redeem any portion of the property.

17. Other defendants also have pleaded in the same manner but claiming some portion of the suit property and the trial Court having framed proper issues and permitted the parties to record evidence on such issues during which on the part of the plaintiff besides examining one witness for oral evidence, 10 documents would be marked for documentary evidence and, on the part of the court, two documents would be marked i.e. report and the plan of the Advocate Commissioner as Ex.C.1 and C.2.

18. The trial Court, having framed 11 issues and having traced the facts pleaded by parties in the proper manner has appreciated the evidence placed on record in the context of the pleadings by parties and would ultimately dismiss the suit with costs and on appeal the appellate Court also would concur with the trial Court and dismiss the appeal as a result of which, left with no option, the plaintiff has come forward to file the above second appeal for determination of the substantial questions of law extracted supra.

19. The lower appellate Court has clearly dealt with both the provisions of law under Section 25 of the Travancore Nayar Act which has relevance regarding the first substantial question of law, stating that this provision of law discloses that except for consideration of Tarwad and with the written consent of all the major members of Tarwad as Karnavan or other managing member shall sell Tarwad immovable or mortgage it with possession for a period of more than 12 years and that there is a statutory bar in respect of alienation of the property by the other members of Tarwad.

20. Here, two aspects are relevant, the first one being the limitation period of 12 years and the second one being the statutory bar created by law regarding the alienation of the property by members outside the Tarwad. Factually, since both the Courts have concurrently arrived at the conclusion that the 12 years period has been crossed through, it is a case which has been hopelessly barred by limitation. The Courts below have further held that since the plaintiff has purchased the property from the other members of the Tarwad, she has not conveyed anything in the suit property legally and, therefore, there is no question of loitering too much on the two issues raised in the first substantial question of law both of which have been decided on factual conclusions arrived at regarding the time bar and the other bar created for outside the members of Tarwad by both the Courts below and hence, the first substantial question of law raised in this second appeal has to be decided against the appellants and the same is decided accordingly.

21. Regarding I.A.Nos.292 of 1988, 2 of 1989, the lower appellate Court, in paragraph 22 of its judgment, has vividly dealt with stating thereby that both the above Interlocutory applications have been filed under Order XL1 Rule 27 CPC for reception of additional documents, the plaintiff having filed four documents, namely, judgment, Commissioner report final judgment and copy of the decree in O.S.No.336 of 1963 as per I.A.No.282 of 1988 and in I.A.No.2 of 1989, attempting to file yet another document dated 22.4.1942 seeking to entertain the same as additional evidence for both. Assigning tangible reasons in the context of the facts and circumstances of the case as it could be seen from paragraphs 22 to 25 of its judgment dated 23.1.1989, the lower appellate Court has ultimately rejected both the applications on the ground that these documents were absolutely unnecessary to decide the disputes between the parties and in spite of sufficient opportunity, these documents had not been filed and this Court, does not find any more reason required to be offered for rejection of those two documents by the lower appellate Court and, therefore, this Court has to decide that only in satisfaction of the requirements of Order XL1 Rule 27 CPC, the lower Courts have rejected both the applications and, therefore, this Court does not find any valid reason to cause its interference in the decision of the lower appellate Court in regard to the second substantial question of law and hence, the second substantial question of law is also decided against the appellants.

In result,
(i) the above second appeal does not merit acceptance and it becomes only liable to be dismissed and is dismissed accordingly;
(ii) that the judgment and decree dated 23.1.1989 rendered in A.S.No.24 of 1988 by the Court of District Judge, Kanyakuamri at Nagercoil thereby

confirming the judgment and decree dated 18.10.1979 rendered in O.S.No.370 of 1968 by the Court of Additional District Munsif, Kuzhithurai is confirmed.
No costs.
Index :yes
Internet:Yes

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